

Labor Issue 2: Expand Subcontractor Bid Listing



WASHINGTON STATE BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO

AFFILIATED WITH THE BUILDING & CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

MIKE GRUNWALD
President

DAVID JOHNSON
Executive Secretary

Proposed Bid Shopping Remedy - RCW 39.30.060

A test of the effectiveness of the current bid-shopping discovered that, as written, it is essentially unenforceable.

There are three fundamental elements of the legislation that must be changed in order to enact the intent of the legislation, which is to eliminate bid shopping from the public bidding process. These three critical elements are:

1. Eliminate the one-hour time period after bid submittal that is granted to prime contractors before they are required to submit their subcontractor lists.
2. Eliminate the requirement that the subcontractor must prove that substitutions occurred "in furtherance of bid shopping or bid peddling." The current language speaks to the motive of the Prime Contractor for substituting a subcontractor. This standard is almost impossible to prove. Legitimate reasons for substitutions of named subcontractors are already established in the law under Section (3).
3. Shift the burden of proof. Currently, the burden of proof rests with the complaining subcontractor to prove that bid shopping occurred. This is an impossible standard which no one can meet. The burden of proof should rest with the Prime Contractor to prove that bid shopping did not occur because substitutions occurred for reasons established in the law.

The additions are underlined and highlighted in yellow. The redactions are struck-out and highlighted in green. The changes are as follows:

Bill Summary: This is standard language that is used to summarize the bill and is generally used as the "Bill Report" that accompanies the proposed legislation.

Statement of Legislative Intent: This is standard language that is generally utilized at the beginning of proposed legislation to establish the reason for presenting the bill.

SECTION I:

1. Removes the up to one hour after bid submittal time extension for listing subcontractors because subcontractors should have been selected prior to bid submittal and, in the era of cell phones and text messaging, it is far to easy for prime contractors to utilize the hour to engage in bid shopping.
2. Adds a clarification that the names of subcontractors are those with whom the Prime contractor will directly contract. It is not a request for sub-tier contractors.

3. Removes the limitation that only HVAC, Electrical, and Plumbing Contractors be named with the bid submittal and requires all subcontractors with whom the Prime will contract to be named. This revision is supported by the State Building Trades and would restore the original requirement.
4. Removes the allowance for bid-alternates.

SECTION II:

1. Removes the language that substitution of a contractor must be "in furtherance of bid shopping or bid peddling."

SECTION III:

1. Shifts the burden of proof from the complaining subcontractor to the Prime Contractor who must then prove by a preponderance of the evidence that a substitution occurred for one or more of the reasons established in the law.
2. Adds the criterion that substitution of a subcontractor may occur if the subcontractor fails to meet the requirements established in the Responsible Bidder Statute signed into law in 2007.

SECTION IV:

1. This revision simply conforms this section to the revision in SECTION I, #3. That change requires the listing of all subcontractors instead of just HVAC, Electric and Plumbing.

SECTION V:

1. NEW SECTION: Establishes and clarifies type of violation; entitles prevailing plaintiff to treble (triple) damages, and establishes a requirement that attorneys fees and costs be reimbursed to the prevailing plaintiff.
2. Provides that lawsuits be brought in Superior Court rather than being required to go to arbitration.

SECTION VI:

Section Number is changed. No revision to language.

Oregon Statute

279.027 - Requirements for bid documents and bids; disclosure of first-tier subcontractors

(1) A public contracting agency preparing bid documents for a public contract shall, at a minimum, include:

(a) A statement that, if the contract is for a public work subject to ORS 279.348 to 279.380 or the Davis-Bacon Act (40 U.S.C. 276a), no bid will be received or considered by the public contracting agency unless the bid contains a statement by the bidder as a part of its bid that the provisions of ORS 279.350 or 40 U.S.C. 276a are to be complied with;

(b) The date and time after which bids will not be received, which shall be not less than five days after the date of the last publication of the advertisement;

(c) The date that prequalification applications must be filed under ORS 279.039 (1) and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;

(d) The character of the work to be done or the material or things to be purchased;

(e) The office where the specifications for the work, material or things may be reviewed;

(f) The name and title of the person designated for receipt of bids;

(g) The date, time and place that the public contracting agency will publicly open the bids;

(h) A statement that each bid must identify whether the bidder is a resident bidder, as defined in ORS 279.029;

(i) A statement that the public contracting agency may reject any bid not in compliance with all prescribed public bidding procedures and requirements and may reject for good cause any or all bids upon a finding of the agency that it is in the public interest to do so;

(j) Information addressing whether a contractor or subcontractor must be licensed under ORS 468A.720; and

(k) A statement that no bid for a construction contract shall be received or considered by the public contracting agency unless the bidder is licensed by the Construction Contractors Board or licensed by the State Landscape Contractors Board as required by ORS 671.530.

(2) All bids made to the public contracting agency pursuant to ORS 279.015 and 279.025 shall be:

(a) In writing.

(b) Filed with the person designated for receipt of bids by the public contracting agency.

(c) Opened publicly by the public contracting agency immediately after the deadline for submission of bids.

(3)(a) Within two working hours after the date and time of the deadline when the bids are due to the public contracting agency for a public improvement, a bidder shall submit to the public contracting agency a disclosure of the first-tier subcontractors that:

(A) Will be furnishing labor or will be furnishing labor and materials in connection with the public improvement; and

(B) Will have a contract value that is equal to or greater than five percent of the total project bid or \$15,000, whichever is greater, or \$350,000 regardless of the percentage of the total project bid.

(b) For each contract to which this subsection applies, the public contracting agency shall designate a deadline for submission of bids that has a date on a Tuesday, Wednesday or Thursday and a time between 2 p.m. and 5 p.m., except that this paragraph does not apply to public contracts for maintenance or construction of highways, bridges or other transportation facilities.

(c) This subsection shall apply only to public improvements with a contract value of more than \$100,000.

(d) This subsection does not apply to public contracts for public improvements that have been exempted from competitive bidding requirements under ORS 279.015 (2).

(4) The disclosure of first-tier subcontractors under subsection (3) of this section shall include the name of each subcontractor, the category of work that each subcontractor will perform and the dollar value of each subcontract. The information shall be disclosed in substantially the following form:

FIRST-TIER SUBCONTRACTOR

DISCLOSURE FORM

PROJECT NAME: _____

BID #: _____

BID CLOSING: Date: _____ Time: _____

This form must be submitted at the location specified in the Invitation to Bid on the advertised bid closing date and within two working hours after the advertised bid closing time.

List below the name of each subcontractor that will be furnishing labor or will be furnishing labor and materials and that is required to be disclosed, the category of work that the subcontractor will be performing and the dollar value of the subcontract. Enter "NONE" if there are no subcontractors that need to be disclosed. (ATTACH ADDITIONAL SHEETS IF NEEDED.)

DOLLAR	CATEGORY
--------	----------

VALUE	OF WORK
-------	---------

\$ _____	_____
----------	-------

_____	_____
-------	-------

\$ _____	_____
----------	-------

_____	_____
-------	-------

\$ _____	_____
----------	-------

_____	_____
-------	-------

\$ _____	_____
----------	-------

Failure to submit this form by the disclosure deadline will result in a nonresponsive bid. A nonresponsive bid will not be considered for award.

Form submitted by (bidder name):

Contact name: _____

Phone no.: _____

(5) A public contracting agency shall accept the subcontractor disclosure. The public contracting agency shall consider the bid of any contractor that does not submit a subcontractor disclosure to the public contracting agency to be a nonresponsive bid and may not award the contract to the contractor. A public contracting agency is not required to determine the accuracy or the completeness of the subcontractor disclosure.

(6) After having been opened, the bids and the subcontractor disclosures shall be filed for public inspection.

(7) A surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008, cashier's check or certified check of each bidder shall be attached to all bids as bid security unless the contract for which a bid is submitted has been exempted from this requirement pursuant to ORS 279.033. Such security shall not exceed 10 percent of the amount bid for the contract.

[Formerly 279.070; 1997 c.351 §2; 1999 c.88 §2; 1999 c.689 §3; 2001 c.104 §86; 2001 c.507 §1; 2003 c.14 §139; 2003 c.535 §1; 2003 c.794 §229a]

Note: 279.027 is repealed March 1, 2005. The repeal of 279.027 applies only to public contracts first advertised, but if not advertised then entered into, on or after March 1, 2005. See sections 332, 336 and 337, chapter 794, Oregon Laws 2003.

Note: See notes preceding 279.005.

RCW 39.30.060

Bids on public works — Identification, substitution of subcontractors.

Bill Digest:

A bill amending RCW 39.30.060, providing for the listing of all subcontractors on public works projects by the successful prime contractor at the time of bid opening, and providing remedies for subcontractors when bid shopping or bid peddling occurs.

Statement of Legislative Intent:

It is the intent of the legislature to ensure that the public bidding process be a fair and open one and to protect subcontractors against the possibility of bid shopping by requiring all prime contractors who bid on public works projects to include as part of their bid submittals, a list of all subcontractors with which the prime will directly contract on each public works project. Therefore, RCW 39.30.060 is amended as follows:

SECTION 1:

(1) Every invitation to bid on a prime contract that is expected to cost one million dollars or more for the construction, alteration, or repair of any public building or public work of the state or a state agency or municipality as defined under RCW 39.04.010 or an institution of higher education as defined under RCW 28B.10.016 shall require each prime contract bidder to submit as part of the bid, ~~or within one hour after the published bid submittal time,~~ the names of all of the subcontractors with whom the bidder, if awarded the contract, will subcontract for performance of the work. ~~of: HVAC (heating, ventilation, and air conditioning); plumbing as described in chapter 18.106 RCW; and electrical as described in chapter 19.28 RCW;~~ or to name itself for as the contractor that will be performing the work.

The prime contract bidder shall not list more than one subcontractor for each category of work identified, ~~unless subcontractors vary with bid alternates, in which case the prime contract bidder must indicate which subcontractor will be used for which alternate.~~ Failure of the prime contract bidder to submit as part of the bid the names of such subcontractors, or to name itself to perform such work, or the naming of two or more subcontractors to perform the same work, shall render the prime contract bidder's bid nonresponsive and, therefore, void.

SECTION II:

(2) Substitution of a listed subcontractor ~~in furtherance of bid shopping or bid peddling~~ before or after the award of the prime contract is prohibited and the originally listed subcontractor is entitled to recover monetary damages from the prime contract bidder who executed a contract with the public entity and the substituted subcontractor, but not from the public entity inviting the bid.

SECTION III:

(3) Substitution of a subcontractor shall be deemed presumptive of bid shopping unless the prime contractor can prove by a preponderance of the evidence that the originally named subcontractor was unable to perform the work for one or more of the following reasons: It is the original subcontractor's burden to prove by a preponderance of the evidence that the bid shopping or bid peddling occurred. Substitution of a listed subcontractor may be made by the prime contractor for the following reasons:

- (a) Refusal of the listed subcontractor to sign a contract with the prime contractor;
 - (b) Bankruptcy or insolvency of the listed subcontractor;
 - (c) Inability of the listed subcontractor to perform the requirements of the proposed contract or the project;
 - (d) Inability of the listed subcontractor to obtain the necessary license, bonding, insurance, or other statutory requirements to perform the work detailed in the contract; or
 - (e) The listed subcontractor is barred from participating in the project as a result of a court order or summary judgment.
- (f) The listed subcontractor fails to meet the requirements established in RCW 39.04.350 for responsible bidders on public works projects.

SECTION IV:

(34) The requirement of this section to name the prime contract bidder's proposed HVAC, plumbing, and electrical subcontractors applies ~~only to proposed HVAC, plumbing, and electrical~~ to all subcontractors who will contract directly with the prime contract bidder submitting the bid to the public entity.

SECTION V:

(5) NEW SECTION: A violation of this section shall also be deemed a violation of RCW 19.86, entitling the prevailing plaintiff to recover treble damages, in addition to its attorney's fees and costs. Any action brought pursuant to this section shall be brought exclusively in the superior court of the county in which the public work was situated.

SECTION VI:

(46) This section does not apply to job order contract requests for proposals under *RCW 39.10.130.

[2003 c 301 § 5; 2002 c 163 § 2; 1999 c 109 § 1; 1995 c 94 § 1; 1994 c 91 § 1; 1993 c 378 § 1.]

Notes:

***Reviser's note:** RCW 39.10.130 was recodified as RCW 39.10.420 pursuant to 2007 c 494 § 511, effective July 1, 2007.

Intent -- 2002 c 163: "This act is intended to discourage bid shopping and bid peddling on Washington state public building and works projects." [2002 c 163 § 1.]

Application -- 1994 c 91: "This act applies prospectively only and not retroactively. It applies only to invitations to bid issued on or after June 9, 1994." [1994 c 91 § 2.]

Application -- 1993 c 378: "This act applies prospectively only and not retroactively. It applies only to invitations to bid issued on or after July 25, 1993." [1993 c 378 § 2.]

